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No. 83-534

In the Supreme Court of the United States

OCTOBER TERM, 1983

CURTIS FARBER,

Appellant,

v.

STATE OF OREGON,

Appellee,

On Appeal from the Supreme Court of the State of Oregon

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Does the prosecution violate the accused's Sixth Amendment right to be confronted with the witnesses against him in a criminal case by introducing evidence of the out-of-court declarations of a co-conspirator who is unavailable to testify, when those declarations not only satisfy the traditional requirements of the "co-conspirator exception" to the rule against hearsay, as codified by statute, but also possess additional indicia of reliability?

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the State of Oregon, appellee, moves for an order dismissing this appeal, on the ground that the appeal does not present a substantial federal question. In the alternative, appellee moves for an order affirming the decision of the Oregon Supreme Court in this case, on the ground that the decision below is clearly correct.

OPINIONS BELOW

Appellee accepts appellant's designation of the opinions delivered in the courts below.

JURISDICTION

Appellee accepts appellant's statement of the grounds on which the jurisdiction of this Court is invoked.

CONSTITUTIONAL PROVISIONS AND STATUTES

Appellee accepts appellant's statement of the constitutional provisions and statutes involved in this case.

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the nature of the proceedings below and his statement of the manner in which he raised the federal question he seeks to have reviewed.

Appellee accepts appellant's statement of the facts as sufficient for preliminary consideration of this appeal, but submits that the facts material to the appeal are more succinctly stated in the opinion of Oregon Supreme Court (Jur. St. at A35-A39, 295 Or. at 201-205, 666 P.2d at 822-824).

Appellee acknowledges that, whatever the merits of the question may be, a federal question has been properly raised and preserved in this case. *See* Jur. St. at A41 n.10, 295 Or. at 207 n.10, 666 P.2d at 825 n.10.)

REASONS FOR DISMISSING OR AFFIRMING

The federal question presented in this case was correctly decided below. Neither the issue nor the state court's resolution of the question warrants further review by this Court under the substantial federal question standard.

This case concerns the admissibility, in a prosecution for murder, of the out-of-court declarations of a co-conspirator who was unavailable to testify against the accused because he invoked his privilege against self-incrimination. The case thus touches upon a question which has caused the Court some concern in the past. At issue is the extent to which hearsay evidence is admissible in a criminal case, if the evidence falls within an exception to the general rule against hearsay, notwithstanding the accused's

Sixth Amendment right to be confronted with the witnesses against him. However, insofar as that issue is presented in this case, it has been resolved by the prior decisions of this Court. The present case is not an appropriate one for further consideration of that issue.

As the Oregon Supreme Court noted at the outset of its discussion of Farber's Confrontation Clause argument, this Court held in 1924 that the Confrontation Clause does not prohibit the introduction of declarations of a co-conspirator who is unavailable at the time of trial. *Delaney v. United States*, 263 U.S. 586, 590 (1924). It is true, as Farber's jurisdictional statement indicates, that in several more recent decisions, the Court has expressed renewed concern about the relationship between the use of hearsay in criminal cases and the Confrontation Clause of the Sixth Amendment. But those decisions cast no doubt upon the admissibility of the declarations of Farber's co-conspirator in this case.

In *Barber v. Page*, 390 U.S. 719 (1968), the Court examined the alleged inadequacy of the prosecution's showing that the declarant whose former testimony had been used in Barber's trial was unavailable to testify in person. The Court held that a prosecution witness is not "unavailable," for the purposes of determining whether his former testimony is admissible in a criminal case, unless the

prosecution has made a good faith effort to obtain his presence at trial. 390 U.S. at 724-725.

In the present case, however, the unavailability of Farber's co-conspirator, Whitney, is not contested. To the contrary, as the Oregon Supreme Court observed, defense counsel himself reported to the trial court that Whitney was unavailable to testify, because Whitney would invoke his privilege against self-incrimination if called as a witness. Jur. St. at A43, 295 Or. at 209, 666 P.2d at 826-827.

Farber's jurisdictional statement presents no constitutional challenge to the rule, followed in Oregon and most jurisdictions, that a witness who invokes a valid privilege not to testify is "unavailable," within the meaning of the law of hearsay. Indeed, such a challenge would be inconsistent with the position Farber took below.

The present case is also clearly distinguishable from *Dutton v. Evans*, 400 U.S. 74 (1970), the most recent case in which this Court discussed the Confrontation Clause implications of co-conspirators' statements. That case involved a statement allegedly made by Evans' co-defendant shortly after his arraignment, and therefore at a time which most jurisdictions would consider to be after any conspiracy had ended. Under Georgia law, however, the "concealment phase" of the conspiracy continued through the time the statement supposedly had been

made. Evans' Confrontation Clause argument was based on this peculiarity of Georgia law. He did not question the admissibility, in criminal cases, of statements which fall within more generally accepted limits of the "co-conspirator exception" to the rule against hearsay.

Contrary to the assertion at page 23 of Farber's jurisdictional statement, the Georgia co-conspirator statute involved in *Dutton v. Evans* is not "identical in effect to the Oregon law questioned on this appeal." Though silent on the point, the Oregon statute in effect at the time of Farber's trial, former Oregon Revised Statutes 41.900(6), had long been construed to render admissible only statements of a co-conspirator made "during the course of the conspiracy," as that phrase generally is understood. *See* Jur. St. at A48, 295 Or 214, 666 P.2d at 829-830. Even if the former Oregon statute had not been so limited, the co-conspirator's statements challenged in the present case clearly were made in the course of an existing conspiracy. This case involves out-of-court statements which satisfy the requirements of a firmly rooted exception to the rule against hearsay, as that exception traditionally has been formulated. This case does not involve statements which could only be received under an aberrant variation of that exception, like the one involved in *Dutton v. Evans*.

Perhaps it was discomfort with the breadth of the "co-conspirator exception" involved in *Dutton v. Evans* which led four members of the Court, speaking through Justice Stewart, to seek and find additional indications that the declarant's statement in that case was reliable, beyond those presumed to exist in any statement which meets the requirements of the traditional hearsay exception for co-conspirators' statements. Whether or not such additional indicia of reliability are constitutionally required of co-conspirators' statements which *do* fall within the traditional hearsay exception, the statements of Farber's co-conspirator in the present case clearly possess such additional indicia of reliability, as the Oregon Supreme Court's analysis of those statements demonstrates. *See* Jur. St. at A43-A48, 295 Or. at 209-214, 666 P.2d at 827-829.

More recently, in *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court again considered the Confrontation Clause implications of hearsay evidence presented by the prosecution in a criminal case. That case, like *Barber v. Page*, dealt with "former testimony," given on preliminary hearing by a witness who did not testify at trial. In *Roberts*, however, the "unavailability" of the declarant at the time of trial was far clearer than it had been in *Barber*.

In its decision upholding the admission of the former testimony presented in *Roberts*, the Court

reiterated that, in general, the Confrontation Clause implies preference, when it does not require, that the evidence against the accused in a criminal case be presented through the testimony of "live witnesses" in open court. However, the Court recognized that, at least where witnesses are "unavailable," hearsay evidence is constitutionally permissible, if the evidence in question passes a threshold test of "reliability." The Court then held that the reliability of hearsay evidence "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," 448 U.S. at 66, and that the use of evidence which falls within such an exception therefore does not violate the Confrontation Clause.

The "co-conspirator exception" to the rule against hearsay, as traditionally formulated, is, of course, an exception firmly rooted in the Anglo-American legal system. *See* Jur. St. at A39, 295 Or at 205, 666 P.2d at 824. As noted above, Oregon's formulation of that exception does not differ from the one generally recognized in other jurisdictions; and the co-conspirator's statements involved in this case not only meet the requirements of that traditional formulation of the exception, but possess additional indicia of reliability as well.

As one of his reasons for urging that the question presented in this case is substantial enough to

warrant plenary consideration, Farber argues, at pages 27-29 of his jurisdictional statement, that this Court's decisions in *Dutton v. Evans* and *Ohio v. Roberts* "have produced inconsistent decisions in the lower courts." This assertion is based on the fact that some federal circuits have held that the statements of co-conspirators fall within a "firmly rooted" exception to the rule against hearsay and therefore require no further showing of "trustworthiness" in order to be admissible, while other circuits have examined such statements, on a case-by-case basis, for various indicia of particular reliability.

Even assuming, however, that this conflict among the federal circuits is one which merits resolution by this Court, the present case is not one in which the lower court resolved that conflict against the accused. As we have already noted, the Oregon Supreme Court did not hold the statements of Farber's co-conspirator automatically admissible, simply because they met the requirements of Oregon's "co-conspirator exception" to the rule against hearsay. Rather, the court carefully analyzed the statements for additional guarantees of reliability, in the manner prescribed by the more restrictive rule it found to be utilized in "most circuits." Jur. St. A43-A46, 295 Or. at 209-212, 666 P.2d at 827-829. The court concluded, correctly, that the statements in this case not only satisfied the requirements of

the "co-conspirator exception," but also possessed additional guarantees of reliability which further justified their admission. Regardless how this Court might resolve the conflict between those jurisdictions which automatically admit statements of co-conspirators and those which require that the admissibility of such statements be considered on a case-by-case basis, the statements challenged in this case are admissible, and the judgment of the Oregon Supreme Court should be affirmed. Plenary consideration of a case which necessarily should be affirmed, regardless of the Court's disposition of the question presented, is not warranted.

Finally, we note that, as another ground for granting plenary consideration in this case, Farber suggests, at pages 29-31 of his jurisdictional statement, that the rationale for admitting evidence of co-conspirators' statements in criminal cases is inconsistent with the Court's reasoning in *Bruton v. United States*, 391 U.S. 123 (1968). This suggestion obscures the fact that *Bruton* dealt with the confession of a co-defendant, following his arrest, which clearly did not fall within the scope of the "co-conspirator exception" to the rule against hearsay, and which was not claimed to be admissible against Bruton on that basis. Indeed, it was not claimed to be admissible *against Bruton* on any basis. To the contrary, the issue in *Bruton* was whether, in a joint

trial, the jury was capable of following an instruction that it could consider the co-defendant's confession as evidence against the co-defendant, but must disregard it as to Bruton. The Court's reasoning on that issue is not inconsistent with its reasoning on the issue of whether hearsay which is otherwise admissible can be received in a criminal case without violating the Confrontation Clause.

CONCLUSION

The federal question presented in this case was correctly decided below, based on the prior decisions of this Court. Farber's jurisdictional statement presents no substantial reason why the Court should reconsider those decisions. Accordingly, the judgment of the Oregon Supreme Court in this case should be affirmed, or in the alternative, this appeal should be dismissed.

Respectfully submitted,

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